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EXAMINER

FIDEI, DAVID

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BETH A. LANGE

Appeal 2009-005918
Application 10/741,678
Technology Center 3700

Decided: April 27, 2010

Before: JENNIFER D. BAHR, STEFAN STAICOVICI, and FRED A.
SILVERBERG, *Administrative Patent Judges.*

BAHR, *Administrative Patent Judge.*

DECISION ON APPEAL

STATEMENT OF THE CASE

Beth A. Lange (Appellant) originally appealed under 35 U.S.C. § 134 (2002) from the Examiner's decision rejecting claims 15, 23, 28, and 29 under 35 U.S.C. § 103(a) as being unpatentable over Ehrlich (US 4,221,221, issued Sep. 9, 1980) and Gallo (US 6,622,856 B2, issued Sep. 23, 2003) and claims 20-22 under 35 U.S.C. § 103(a) as being unpatentable over Ehrlich, Gallo, and Moore (US 6,405,867 B1, issued Jun. 18, 2002). After Appellant implicitly withdrew claims 20-22 from the appeal (*see* App. Br. 2), the Examiner canceled claims 20-22 (*see* Office communication mailed Dec. 18, 2008). Accordingly, this appeal involves only claims 15, 23, 28, and 29. Claims 2-5, 7-14, 18, 19, and 24-26, the only other claims pending in the application, have been withdrawn from consideration. We have jurisdiction over this appeal under 35 U.S.C. § 6 (2002).

The Invention

Appellant's claimed invention is directed to absorbent articles pre-packaged with sunscreen. *See* Spec. 1, para. 1.

Claim 29, reproduced below, is representative of the claimed subject matter.

29. A pre-packaged absorbent article and sun protection accessories arrangement, said pre-packaged arrangement comprising:

an absorbent article for personal wear; and a sunscreen carrier containing a sunscreen composition, the sunscreen carrier being releasably adhered directly to the absorbent article for distribution together as a single unit.

SUMMARY OF DECISION

We AFFIRM.

ISSUE

The issue presented in this appeal is whether the combined teachings of Ehrlich and Gallo render obvious a sunscreen carrier containing a sunscreen composition releasably adhered to an absorbent article, such as the utility diaper of Ehrlich.

FACTS PERTINENT TO THE ISSUE

1. Ehrlich describes a utility diaper structure 12 including a diaper 14 (an absorbent article for personal wear), having a plurality of container assemblies 16 releasably adhered thereon to hold baby maintenance items. Col. 1, ll. 44-47, col. 2, ll. 16-19, 24-27, 42-45, 53-56, 64-66; fig. 1.
2. Although Ehrlich illustrates three container assemblies 16 containing powder, oil, and a towel, Ehrlich teaches that more or fewer container assemblies may be used. Col. 3, ll. 17-20. In other words, Ehrlich explicitly contemplates inclusion of other baby maintenance items in addition to or in place of the specifically illustrated powder, oil, and towel containers.
3. Ehrlich teaches that attachment of the baby maintenance items to a diaper is especially advantageous for travel, so that the needed maintenance items will always be available. Col. 3, ll. 29-31.
4. Ehrlich does not specifically disclose adhering a sunscreen container to the diaper.

5. Gallo discloses keeping a plurality of products used for caring for children, and infants in particular, together in a kit. Col. 1, l. 63 to col. 2, l. 3. Diapers, wipes, and sunscreen are among the products disclosed by Gallo for inclusion in the kit. Col. 3, ll. 37-40, col. 4, ll. 10-12, and col. 5, ll. 20 and 26.
6. Appellant admits that the potentially harmful effects of overexposure to the sun were known at the time of Appellant's invention, and that, consequently, it has become increasingly important for caregivers to take well known sun protection accessories, such as sunscreen, along for outdoor activities for use in protecting children from the sun. Spec. 1, para. 3.

DISCUSSION

Appellant does not present any separate arguments for the patentability of the dependent claims apart from independent claim 29. *See* App. Br. 9. Thus, dependent claims 15, 23, and 28 stand or fall with claim 29. 37 C.F.R. § 41.37(c)(1)(vii) (2007).

Ehrlich discloses releasably adhering products used for baby maintenance, that is, caring for babies, to a diaper to form a utility diaper structure. Fact 1. While Ehrlich illustrates three container assemblies 16 containing powder, oil, and a towel, Ehrlich explicitly contemplates inclusion of other baby maintenance items in addition to or in place of the specifically illustrated powder, oil, and towel containers. Fact 2. Accordingly, any notion that Ehrlich's baby maintenance items are limited to diaper changing accessories (*see* App. Br. 5) is not commensurate with the scope of Ehrlich's teachings.

As evidenced by Gallo, it was known in the art at the time of Appellant's invention to assemble a plurality of products, including diapers, wipes, and sunscreen, for caring for children, and particularly infants (babies), together in a kit. Fact 5. The teachings of Gallo, as well as the admission by Appellant that sunscreen was a well known sun protection accessory for use in protecting children from the sun during outdoor activities (Fact 6), establish that sunscreen was a well known baby maintenance product at the time of Appellant's invention.

Thus, the Examiner correctly concluded that it would have been obvious to include a sunscreen container containing a sunscreen composition as one of the baby maintenance items releasably adhered to Ehrlich's utility diaper. *See* Ans. 4. The modification proposed by the Examiner is nothing more than the predictable use of prior art elements according to their established functions. *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 417 (2007) (an improvement that is nothing more than the predictable use of prior art elements according to their established functions is likely to be obvious). In particular, a person of ordinary skill in the art would have appreciated that it would have been advantageous to include sunscreen, a well-known accessory for the care/protection of babies for outdoor activities, on the utility diaper of Ehrlich, so that the sunscreen would be available when needed. *See* Fact 3.

Appellant argues that one skilled in the art would not be motivated by Gallo to releasably secure sunscreen directly to an absorbent article because Gallo "fail[s] to recognize the importance of such a securement serving as an automatic reminder to the caregiver, upon changing the absorbent article, to apply sunscreen to the child even though the sunscreen is otherwise wholly

unrelated to the absorbent article and its changing process.” App. Br. 8. This argument is unconvincing, because it attacks the teachings of Gallo in isolation, rather than in combination with Ehrlich, as applied in the rejection. *See In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986) (nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures). Moreover, the Supreme Court has stated that a rigid insistence on teaching, suggestion, or motivation is incompatible with its precedent concerning obviousness. *KSR*, 550 U.S. at 419. Furthermore, in determining whether the subject matter of a claim is obvious, “neither the particular motivation nor the avowed purpose of the [applicant] controls. What matters is the objective reach of the claim.” *Id.* If the claim extends to what is obvious, it is unpatentable under § 103. *Id.* For the reasons discussed above, the Examiner’s articulated reason for making the modification, namely, “to provide added protection utility to the assembly” (Ans. 4), has rational underpinning.

CONCLUSION

The combined teachings of Ehrlich and Gallo render obvious a sunscreen carrier containing a sunscreen composition releasably adhered to an absorbent article, such as the utility diaper of Ehrlich. Thus, we sustain the rejection of independent claim 29 and dependent claims 15, 23, and 28, which fall therewith, as being unpatentable over Ehrlich and Gallo.

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DECISION

The Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

mls

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